UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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MARY PROCACCINO-HAGUE

Plaintiff,

-against-

BOLL FILTER CORPORATION AND
BOLL & KIRCH FILTERBRAU GMBH

No. 3:03 CV 1560 (GLG)

Defendants.

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RULING ON DEFENDANTS' MOTION TO DISMISS

Before this court is defendants' motion to dismiss the plaintiff's claims against Boll & Kirch, and Counts Five and Six. For the reasons set forth below, the court **grants in part and denies in part** defendants' Motion to Dismiss **(Doc. #9)**.

I. Factual History and Procedural Background

On September 11, 2003, plaintiff, Mary Procaccino-Hague, filed a seven-count complaint against defendants, Boll Filter Corporation and Boll & Kirch Filterbrau GMBH, alleging gender discrimination under 42 U.S.C. § 2000e et seq., violations of the Connecticut Fair Employment Practices Act (FEPA), the Connecticut Free Speech Act, negligent infliction of emotional distress, respondeat superior, breach of good faith and fair dealing, and violations of Connecticut General Statute § 31-72. In her complaint, plaintiff alleges that

Boll & Kirch is a German corporation and is the parent company of defendant Boll Filter, which formerly maintained an office in Granby, Connecticut and currently operates out of Plymouth, Michigan. Plaintiff resides in Barkhamsted, Connecticut.

Plaintiff alleges that she commenced employment at Boll Filter as an accountant on July 3, 2001. She claims that she was wrongfully denied promotions and a raise and that her supervisor, Richard Craine, told her that Boll Filter was controlled by its German parent company, which operated under a different set of laws which permitted the company to compensate men and women differently for the same type of work. (Compl. ¶¶13-15). Plaintiff also alleges that she informed Craine that she believed that Boll Filter was not complying with generally accepted accounting principles (GAAP) and that Craine responded that Boll Filter was controlled by its German parent company, which operated under a different set of accounting standards. (Compl. ¶16). Plaintiff next claims that on June 10, 2002, she was wrongfully terminated by Craine because he said that she had disclosed confidential information. (Compl. ¶17). As plaintiff left the building, she alleges, inter alia, that the office manager, Christine Thibeault, assaulted plaintiff and broke one of her toes. (Compl. ¶19).

After plaintiff's employment was terminated, plaintiff alleges that she voluntarily met with Wilfred Klein and Silke Pflumm,

representatives of Boll & Kirch, at Bradley International Airport to discuss accounting irregularities at Boll Filter based on Klein's promise that he would pay her a reasonable severance payment. (Compl. Count Six, ¶24). Plaintiff complains that neither defendant has made any severance payment nor have they compensated plaintiff for the time she spent meeting with Boll & Kirch to explain the accounting irregularities. (Compl. Count Six, ¶27).

On November 7, 2003, defendants filed a motion to dismiss all claims against Boll & Kirch due to lack of personal jurisdiction, Count Six alleging breach of good faith and fair dealing because it fails to state a valid cause of action, and Count Five alleging respondeat superior directed at Boll Filter because it is duplicative of Count Four which alleges negligent infliction of emotional distress. Defendants contend that plaintiff has not sufficiently alleged facts that would confer personal jurisdiction over Boll & Kirch under the Connecticut Long Arm Statute and that the "alter ego" theory does not apply to this case. (Defs.' Mem. at 6).

In defendants' reply brief, defendants also argue for the first time that service of process on Boll & Kirch does not comport the requirements of Rule 4 of the Federal Rules of Civil Procedure. The court will not address this argument because it was not a matter raised in plaintiff's opposition. See D. Conn. L. Civ. R. 7(d)(reply briefs "must be strictly confined to a discussion of matters raised

by the responsive brief"); Knipe v. Skinner, 999 F.2d 708, 711 (2d Cir.1993)("Arguments may not be made for the first time in a reply brief.").

Additionally, the court notes that the affirmation of Michele LaTorre, President of Boll Filter, attached to defendants' reply brief as Exhibit B is unsworn. "An unsworn affirmation is valid if it is a writing of the individual making the affirmation which is subscribed by that person as true under penalty of perjury." Rafkind v. Oxford Capital Securities, Inc., No. 92 CIV 2354 (JSM), 1997 WL 328067, at *1 (S.D.N.Y. June 16, 1997). LaTorre's affirmation is unsworn and does not subject him to penalties of perjury pursuant to 28 U.S.C. § 1746. Thus, the court will not deem it to be competent evidence.

II. Standard of Review

In deciding a motion to dismiss, the court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. See Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 504 U.S. 911 (1992). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957)(footnote omitted). The issue on a motion to dismiss "is not whether the plaintiff will prevail, but whether he is entitled to

offer evidence to support his claims." United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citation omitted).

Lack of personal jurisdiction is properly raised by a motion to dismiss. In re Perrier Bottled Water Litigation, 754 F. Supp. 264, 268 (D.Conn.1990). Where the parties have not yet engaged in jurisdictional discovery and where no evidentiary hearing has been held, plaintiff is required only to make a prima facie showing of jurisdiction. See Tomra of North America, Inc. v. Environmental Products Corp., 4 F.Supp.2d 90, 91-92 (D.Conn. 1998)(citations omitted).

III. Discussion

A. Personal Jurisdiction

This matter involves both a federal question and diversity of citizenship and presents a question of personal jurisdiction. In a federal question case involving a foreign defendant, where the federal statute does not provide for national service of process, a federal court must apply the forum state's personal jurisdiction rules. PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir.1997). The resolution of the jurisdictional issue involves a two-part analysis. See Knipple v. Viking Communications Ltd., 236 Conn. 602, 607, 674 A.2d 426 (1996). As a threshold matter, the court must determine whether Connecticut's applicable long-arm

statute reaches a particular defendant. Only if the court finds the state long-arm statute to be applicable does it reach the second part of the analysis, which examines whether asserting jurisdiction violates constitutional principles of due process. Lombard Bros., Inc. v. General Asset Mgmt. Co., 190 Conn. 245, 250, 460 A.2d 481 (1983).

The Connecticut Long Arm Statute provides in relevant part:

> Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this state or to be performed in this state; . . . or (4) out of tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

Conn. Gen. Stat. § 33-929(f). This section requires only "a nexus between the cause of action alleged and the conduct of the defendant within the state." Whelen Engineering Co. v. Tomar Electronics, Inc., 672 F.Supp. 659, 662 (D.Conn.1987)(finding that a foreign manufacturer who distributed its products exclusively through a third party retailer was subject to jurisdiction under Connecticut's long-arm statute in a trademark infringement case).

Plaintiff contends that she has stated a prima facie claim of jurisdiction under C.G.S. § 33-929(f)(1) because Klein, a

representative of Boll & Kirch made an oral contract with plaintiff at Bradley International Airport in Windsor Locks, Connecticut to provide severance pay in exchange for plaintiff's information regarding accounting irregularities at Boll Filter. Plaintiff also maintains that Boll & Kirch is subject to this court's jurisdiction under the C.G.S. § 33-929(f)(4) because Boll & Kirch either directly or indirectly through Boll Filter committed tortious acts, i.e. wrongful termination and negligent infliction of emotional distress.

The court concludes that plaintiff has plead sufficient facts to support a prima facie case of personal jurisdiction over Boll & Kirch. In her complaint, plaintiff alleges, inter alia, that "Boll Filter and Boll & Kirch are an integrated enterprise and constitute a single enterprise in that the two entities have interrelated operations, a centralized control of labor relations, common management and financial control by the parent." (Compl. ¶4). In her affidavit, plaintiff states that Boll & Kirch hired the presidents of Boll Filter, set forth the employment terms and conditions for some of the Boll Filter sales staff, that financial statements were sent to Boll & Kirch at least quarterly, that certain Boll Filter employees regularly traveled to Boll & Kirch's offices in Germany, that all product came from Boll & Kirch in Germany and most of the time it was shipped directly to the customer, that Boll Filter did not create any marketing materials and that Boll Filter operated more

as a branch office of Boll & Kirch rather than as a separate entity. (Pl.’s Aff. At 2-3).

B. Federal Due Process

As defendant Boll & Kirch’s conduct falls within the reach of the applicable long-arm statute, the relevant question becomes whether the exercise of jurisdiction comports with due process. The due process requirement for personal jurisdiction shields a person without significant ties to the forum state from being haled into a foreign court. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). By requiring "fair warning" that an individual's activities in a state may subject him to suit there, the Due Process Clause protects that person's liberty interest and "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). A "defendant's conduct and connection with the forum State [should be] such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

The due process test for personal jurisdiction has two related components: the "minimum contacts" analysis and the "reasonableness" analysis. Milne v. Catuogno Court Reporting Services, Inc., 239

F.Supp.2d 195, 203 (D.Conn.2002). Initially, the court must determine if the defendant has sufficient minimum contacts with the forum state to justify the court's exercise of personal jurisdiction. Id. To have sufficient minimum contacts, a defendant must purposely avail himself of the privileges and benefits of the forum state. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

In the present case, plaintiff has alleged injuries that arises out of or relates to defendants' business activities in Connecticut. As detailed earlier, plaintiff has alleged that at all relevant times Boll Filter, a Connecticut corporation, had a principal place of business in Granby, CT and employed eleven persons. Plaintiff further alleges Boll Filter and Boll & Kirch constituted a single enterprise. Thus, based on the totality of the circumstances, Boll & Kirch has sufficiently availed itself of the privileges of Connecticut. See Milne, 239 F.Supp.2d at 205. Based on the pleadings and supporting affidavit, Boll & Kirch's contacts with Connecticut were "continuous and systematic" and as a result satisfy the minimum contacts requirement.

The second step of the Due Process analysis inquires as to whether the assertion of personal jurisdiction comports with "traditional notions of fair play and substantial justice." See Int'l Shoe, 326 U.S. at 316. Asserting jurisdiction over Boll & Kirch in Connecticut is reasonable. Plaintiff has a legitimate

interest in this suit proceeding in Connecticut. Plaintiff is not only domiciled here, but Connecticut is also the location of pertinent evidence and witnesses. Additionally, Boll & Kirch cannot argue that it was unaware that it could be subjected to a lawsuit in Connecticut for wrongful termination of an employee and other tortious conduct where Boll & Kirch had established a branch office which employed eleven workers.

Furthermore, "a state generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." Burger King, 471 U.S. at 473. "It usually will not be unfair to subject the [defendant] to the burdens of litigating in another [state] for disputes relating to such activity." Id. at 474. In the present matter, litigation in Connecticut is not "so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent." Id. at 478. Boll & Kirch has not shown that would make defending this action in Connecticut gravely and unfairly inconvenient. Therefore, the court finds that subjecting Boll & Kirch to jurisdiction in Connecticut does not offend due process.

C. Count Five

Count Five of plaintiff's complaint alleges a separate cause of action against defendant Boll Filter for the tortious acts of office manager, Christine Thibeault, under a theory of respondeat superior.

It is duplicative of Count Four which alleges negligent infliction of emotional distress; all the substantive counts name Boll Filter as defendant. Therefore, the court dismisses Count Five.

D. Count Six

The next issue is whether Count Six which asserts a claim for breach of the duty of good faith and fair dealing should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). There would appear to be a question of material fact as to whether there was a contract between the parties and the nature of the contract.

"Every contract carries an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." Habetz v. Condon, 224 Conn. 231, 238, 618 A.2d 501 (1992). The factual allegations are legally sufficient to maintain a cause of action for a breach of good faith and fair dealing.

IV. Conclusion

Accordingly, for the reasons set forth above, the court **grants in part and denies in part defendants' Motion to Dismiss (Doc. #9).** The motion is denied for lack of personal jurisdiction over Boll & Kirch without prejudice to renewal at a later time after additional discovery. The court also denies defendants' motion with respect to Count Six, but grants defendants' motion with respect to Count Five.

SO ORDERED.

Date: January 13, 2004
Waterbury, Connecticut.

/s/
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GERARD L. GOETTEL,
United States District Judge